AND
BRIEF

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No. 16-373

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's business community.

This case presents an issue of great importance to the nation's business community—one more broadly significant than the particular phrasing of the question presented might otherwise suggest. Chamber members routinely are named as defendants in putative class actions in federal court, under federal and state statutes that impose absolute time limits on defendants' liability. This case involves one such

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

statute, the Securities Act of 1933 (Securities Act), but many federal and state laws contain similar provisions. These absolute temporal limits on defendants' liability are termed "statutes of repose." *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014); 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1, at 4-5 (1991). Class litigation is common under many of these statutes.

Petitioner asserts that even though statutes of repose are designed as absolute time limits, federal courts may toll them whenever a putative class action is filed in federal court under the class-action tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Under petitioner's rule, the statute of repose in the Securities Act, and presumably any other federal or state statute of repose, may be circumvented by the simple expedient of filing a complaint on behalf of a putative class. Were that the rule, it could very well expose the Chamber's members and other business defendants to new litigation—and potentially to new liability—long after the point at which, in the legislature's judgment, they are entitled to peace. The Chamber therefore has a strong interest in the resolution of this issue.

SUMMARY OF ARGUMENT

As this Court recognized in *CTS Corp.*, statutes of repose are fundamentally legislative judgments. 134 S. Ct. at 2182-83. They reflect a legislative decision that defendants, at a certain and readily ascertained point, are entitled to peace and need no longer worry about defending actions taken long ago. By adopting a statute of repose, a legislature completely extinguishes liability after a clearly specified time.

Petitioner's broadest position—that Rule 23 somehow supersedes Congress's determination that liability must come to an end on a date certain—is inconsistent not just with Rule 23, but with the very notion of judicial rulemaking. Neither the Rules Enabling Act nor the separation of powers would permit the judiciary to write a rule contradicting the quintessentially *legislative* decision to adopt a set period of repose.

Petitioner submits that the mere filing of *a* class action before the repose date is enough, either because it provides a degree of notice or because it somehow constitutes the constructive "br[inging]" of claims by absent, often indeterminate class members. But the purpose of statutes of repose is to put an end to unasserted claims after a date certain, not to inform defendants that they may need to answer such claims by new plaintiffs in the future. And the mere pendency of a class action often does not provide reliable notice of exposure in any event. Abusive applications of the *American Pipe* rule have proliferated—for example, extending class tolling to *different* claims than those raised by a purported class representative; extending tolling even to filings by wholly inadequate placeholder plaintiffs, who file claims merely to stop the clock so a suitable representative can be sought; and approving the use of successive class actions to evade adverse rulings. Using these tools, class-action plaintiffs' lawyers in many cases are able to stretch out the repose period far beyond what Congress or the state legislature selected.

These consequences all may be avoided simply by enforcing statutes of repose as they are written and

were meant to be applied: to cut off liability absolutely once the statutory period has run. Contrary to petitioner's and its *amici*'s arguments, declining to extend *American Pipe* to repose periods does not threaten the efficacy of the class-action procedure. There is no evidence that the Second Circuit's *IndyMac* rule[2]—which has since been adopted in the Sixth[3] and Eleventh[4] Circuits as well—has produced any of the inefficiencies that petitioner raises in the over four years since that rule has been in effect. To the contrary, empirical evidence shows that federal courts efficiently manage putative class actions, including those brought under the securities laws, leaving adequate time to afford a meaningful choice whether to opt out. The solution to any perceived problems is not to disregard careful legislative judgments about how long a substantive right of action should exist: the solution is merely to announce a clear rule that statutes of repose will be enforced as written.

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[2] *See Police & Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).

[3] *See Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016).

[4] *See Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243 (11th Cir. 2016).

ARGUMENT

I. Statutes of Repose Are Important Under a Wide Range of Federal and State Statutory Schemes That Routinely Are the Subject of Class-Action Litigation

The Securities Act provision at issue here is just one of the many statutes of repose, federal and state, that could be affected by the Court's holding in this case. These various statutes share a common purpose: ensuring that "'after the legislatively determined period of time,'" the defendant "should be able to put past events behind him." *CTS Corp.*, 134 S. Ct. at 2183 (quoting 54 C.J.S., LIMITATION OF ACTIONS § 7, at 24 (2010)). Because that purpose is "central" to statutes of repose, their time periods "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* And although class actions are common under many of these statutes, none of them makes an exception to that strong policy of repose for unnamed class members. Endorsing petitioner's position that a statute of repose *can* be tolled, ostensibly for the sake of better class-action administration, threatens the efficacy of hundreds of statutes of repose and the careful legislative judgments they reflect.

A. Congress and State Legislatures Have Deliberately Selected Statutes of Repose to Limit Liability

As this Court explained in *CTS Corp.*, a legislature's enactment of a statute of repose represents a significant policy choice. Although "there is substan-

tial overlap between the policies of" statutes of repose and statutes of limitations, statutes of repose are animated by "a distinct purpose," *CTS Corp.*, 134 S. Ct. at 2183, and in pursuing that purpose they "strike a stronger defendant-friendly balance." *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199-200 (3d Cir. 2007). The prohibition of tolling is "central" to the selection of a statute of repose rather than, or (as here) in addition to, a statute of limitations. *CTS Corp.*, 134 S. Ct. at 2183. Both Congress and state legislatures have opted to include repose periods, and to reject tolling, in a number of significant statutes—statutes that the resolution of this case could affect. A complete catalogue of repose statutes is beyond the scope of this brief. But certain key examples are illustrative.

1. Perhaps the best-known federal example is the five-year repose period that governs fraud and related claims under the securities laws, 28 U.S.C. § 1658(b)(2). The same statute creates a corresponding limitations period for the same securities claims (two years from discovery). This Court has emphasized that no matter how the *limitations* provision is construed, the *repose* provision "giv[es] defendants total repose," thereby "diminish[ing] th[e] fear" of being "subject . . . to liability for acts taken long ago." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 650 (2010).

But federal statutes of repose also appear outside the securities context, in a number of important and frequently invoked statutes. For instance, Congress included statutes of repose in the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, and the Equal Credit Opportunity Act (ECOA), 15 U.S.C.

§ 1691 *et seq.* Both statutes place an absolute five-year limit on recovery. *See* 15 U.S.C. §§ 1681p(2) (FCRA), 1691e(f) (ECOA); *see also, e.g., Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008) (describing "[t]he ECOA time prescription" as "a statute of repose," as shown by its "sweeping and direct language"); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1234 n.19 (10th Cir. 2014) (same as to FCRA). Similarly, the Truth in Lending Act (TILA), 15 U.S.C. § 1631 *et seq.*, imposes an absolute statute of repose on one of the forms of relief it makes available (rescission). *See id.* § 1635(f); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998).

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1101 *et seq.*, contains a similar statute of repose—though it provides a six-year period in which to sue. *See* 29 U.S.C. § 1113(1). Federal courts treat that provision as "an outside limit" that "serves as an absolute barrier to an untimely suit." *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998); *accord, e.g., Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 959 n.5 (9th Cir. 2016) (describing this provision as a "statute of repose").

2. Statutes of repose also are common in many state statutory schemes. For example, many states have imposed statutes of repose on claims based on construction defects, typically ranging from five to ten years or more, "from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of [an] improvement" to real property. *E.g.*, N.C. GEN. STAT.

§ 1-50(a)(5)(a) (six-year statute of repose).[5] As those states' courts have said, the purpose of these statutes "is to protect from liability those persons who make improvements to real property." *Bryant v. Don Galloway Homes, Inc.*, 556 S.E.2d 597, 600 (N.C. Ct. App. 2001). If the threat of liability lasted for the often decades-long life of the building (thanks to the discovery rule), it would increase the cost of construction, and might drive some out of the construction industry altogether. Moreover, the statute of repose forecloses litigation at a time "when '[a]rchitectural plans may have been discarded, copies of building codes in force at the time of construction may no longer be in existence, [and] persons individually involved in the construction project may be deceased or may not be located.'" *Klein v. Catalano*, 437 N.E.2d 514, 520 (Mass. 1982) (quoting *Howell v. Burk*, 568 P.2d 214, 220 (N.M. Ct. App. 1977) (alteration in original)).

States employ statutes of repose in other contexts for similar reasons. As Judge Posner noted in *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011), the argument for absolute limits on liability is "particularly strong in the case of product defects," and for that reason, many states have imposed statutes of repose on product-liability claims that run "from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury." GA. CODE § 51-1-11(b)(2) (ten-

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[5] *See also, e.g.*, MASS. GEN. LAWS ch. 260, § 2B (similar six-year statute of repose for improvements to real property); NEB. REV. STAT. § 25-223 (ten-year repose period for claims of "deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property").

year repose period).[6] States have made similar judgments with respect to professional-malpractice claims,[7] statutory consumer-protection or unfair-and-deceptive-practice claims,[8] and blue-sky-law claims.[9]

B. Statutes of Repose Strike a Careful Legislative Balance to Mitigate the Threat of Long-Pending Contingent Liabilities

The overriding rationale for statutes of repose is simple: "[B]usiness planning is impeded by contingent liabilities that linger indefinitely." *McCann*, 663 F.3d at 930. "There comes a time when [the defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim" at that point. *Rosenberg v. Town of N. Bergen*, 293 A.2d 662, 667-68 (N.J. 1972). Statutes of repose reflect careful legislative weighing of just how long should be deemed too long, *ex ante*. That is a classically legislative judgment.

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[6] *See also, e.g.*, OR. REV. STAT. § 30.905(2)(a).

[7] *E.g.*, MICH. COMP. LAWS § 600.5838b(1)(b) (six-year statute of repose for legal-malpractice claims); TENN. CODE § 28-3-104(c)(2) (five-year repose period for claims against accountants or attorneys "except where there is fraudulent concealment on the part of the defendant, in which case the action or suit shall be commenced within one (1) year after discovery").

[8] *E.g.*, TENN. CODE § 47-18-110 (five-year statute of repose for consumer-protection claims); WIS. STAT. § 425.307(1) (six-year statute of repose for statutory consumer-protection claims asserted in an affirmative, rather than defensive, posture).

[9] *E.g.*, CAL. CORP. CODE § 25506(b) (five-year statute of repose for private state securities-law claims); TEX. REV. CIV. STAT. art. 581, § 33(H)(2)(b) (same).

Accordingly, where a legislature desires to calibrate a statute of repose to allow more time to sue in certain circumstances, the legislature does so explicitly by means of "legislatively created exceptions"—explicit statutory rules that allow more time to sue in certain circumstances—that (unlike tolling rules courts read into statutory time bars) are "set forth in the statute of repose" itself. 1 CORMAN § 1.1, at 5. For example, ECOA's statute of repose explicitly provides for a limited form of statutory tolling when a governmental plaintiff—but *not* a private plaintiff seeking to be appointed class representative—is pursuing the same claim. 15 U.S.C. § 1691e(f). And ERISA's statute of repose makes special, explicit provision for "fraud or concealment" by a fiduciary defendant, in which case the repose period runs from the discovery of the violation. 29 U.S.C. § 1113.

The statute of repose can be further calibrated by working in tandem with a statute of limitations, as the Securities Act provision at issue here does. In such cases, the statute of repose marks the point beyond which the shorter statute of limitations may not be tolled. If everything that tolled one tolled the other, the longer repose period would be meaningless. In setting the outer limit of repose, Congress can and does weigh the need to allow a reasonable but limited time for the considerations that typically justify tolling of a statute of *limitations*, such as delays in discovering the violation. Thus, for instance, Congress has twice extended the statute of repose for ECOA claims, including one extension expressly for the purpose of providing more time to "develop[ ] and investigat[e] . . . the necessary facts." S. Rep. No. 94-589, at 14 (1976). "Such an accommodation would

have been unnecessary if Congress intended the courts to engraft equitable tolling doctrines onto the statute." *Archer*, 550 F.3d at 508-09. By contrast, Congress *shortened* the repose period at issue here, and thereby limited defendants' exposure to the strict liability imposed by the Securities Act. *See* Securities Exchange Act of 1934, Pub L. No. 73-291, § 207, 48 Stat. 907.

C. This Case Implicates a Wide Range of Statutes of Repose, Because Class-Action Litigation is Common Under the Relevant Statutes

The question presented here implicates the entire spectrum of federal and state statutes of repose, because class actions are common under virtually all of those statutes. A decision extending *American Pipe* tolling to statutes of repose therefore would be felt well beyond the securities context.[10]

Class actions are commonplace under all of the federal consumer-credit statutes, *see* 6 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 21:1, at 388-90 (4th ed. 2002), and ECOA in particular has recently seen "a wave of putative class action lawsuits." Laura C. Baucus *et al.*, *Emerging Topic*, 64 CONSUMER FIN. L.Q. REP. 155, 157 (2010). Indeed, ECOA even specifies—in the very same provision that includes the statute of repose—that

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[10] Indeed, federal courts have already faced the question whether *American Pipe* tolling applies to statutes of repose under ERISA and TILA. *Compare Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176-78 (D. Mass. 2009) (ERISA, yes), *with McMillian v. AMC Mortg. Servs., Inc.*, 560 F. Supp. 2d 1210, 1215 (S.D. Ala. 2008) (TILA, no).

plaintiffs may sue on behalf of a class. *See* 15 U.S.C. § 1691e(a); *see also id.* § 1691e(b) (imposing a special cap on damages recoverable in a class action). Yet despite making certain exceptions to the timeliness rules set out in the ECOA and FCRA statutes of repose, Congress created none for class-action plaintiffs. The same is true under ERISA, which has been a frequent subject of class-action litigation in recent years.

State-law class actions also regularly implicate statutes of repose. The construction-related and products-liability statutes of repose discussed above are examples. *See, e.g.*, *Manor v. D.R. Horton, Inc.*, No. 2:14-CV-2222 JCM, 2016 WL 1045484 (D. Nev. Mar. 15, 2016) (addressing a putative class action bringing defective construction claims against the developer of 103 single-family homes).

Even professional malpractice—another area where statutes of repose are well-established—sees its share of class-action litigation, especially in contexts where the malpractice tort is used to pursue securities-related claims against accountants and lawyers. *See, e.g.*, *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 134, 137 (2d Cir. 2011); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1347 (11th Cir. 2001); *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 184-86 (App. Div. 1998).

Thus, petitioner's argument in its broadest form represents a challenge not just to a single statute of repose, but potentially to *all* of the statutes of repose, federal and state, that can collide with class actions. The careful judgment each of those statutes reflects

would be replaced with an across-the-board rule that class actions *always* justify more time.

II. Allowing Class-Action Tolling of Statutes of Repose Would Override Congress's and the States' Legislative Judgments, Violating the Separation of Powers and Depriving Defendants of the Certainty That Statutes of Repose Are Meant to Provide

Extending *American Pipe* tolling to statutes of repose, as petitioner and its *amici* advocate, necessarily would negate the "legislative judgment" those statutes represent: "that defendants should 'be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'" *CTS Corp.*, 134 S. Ct. at 2183 (quoting 54 C.J.S., *supra*, § 7, at 24). Petitioner contends that Rule 23 allows the courts to set aside that legislative judgment to avoid the inconvenience of multiple filings within the repose period. But Rule 23 does not authorize the judiciary to substitute courts' convenience—much less *plaintiffs'* convenience—for a statutory policy of repose. The Rule does not abridge the substantive right to repose; indeed, neither the Rules Enabling Act nor the separation of powers would *permit* the judiciary to abridge that right by rule.

This Court's decision in *American Pipe* described the tolling it was recognizing as an exercise of the "*judicial* power to toll statutes of limitation in federal court." 414 U.S. at 558 (emphasis added). This was a judicially created rule: the Court focused on prudential considerations in collective litigation, rea-

soning that denying tolling "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. The tolling rule, the Court thought, was thus "the rule most consistent with federal class action procedure," *id.* at 554, and was "necessary to ensure effectuation of the purposes of litigative efficiency and economy that [Rule 23] was designed to serve," *id.* at 556.

Such a rule might be thought to coexist with statutes of *limitations*, as *American Pipe* concluded. *See* 414 U.S. at 556-59. Judicially created doctrines like "equitable tolling," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), are reasonably commonplace, and this Court concluded that a statute of limitations (specifying the period in which suit ordinarily must be brought) conceivably might be read to coexist with those tolling doctrines. *See American Pipe*, 414 U.S. at 556-59.

But the rule with respect to statutes of *repose* is precisely the opposite. As the Court explained in *CTS Corp.*, "a 'critical distinction' between statutes of limitations and statutes of repose 'is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling.'" 134 S. Ct. at 2187 (quoting 4 Wright & Miller, FED. PRAC. & PROC. § 1056, at 240). A statute of repose like that contained in 15 U.S.C. § 77m thus reflects a judgment that repose justifies dispensing with nonstatutory tolling rules. *Cf. Lampf*, 501 U.S. at 363.

Nothing in Rule 23 purports to override such a judgment. *See* Resp. Br. 32. And neither the Rules Enabling Act nor the separation of powers would

permit a *judicial* override of a federal *legislative* judgment that governs substantive rights, not court procedures.

The Rules Enabling Act is not an open-ended delegation of the legislative power to the Judicial Branch. Rather, it is a limited delegation of Congress's "power to regulate the practice and procedure of federal courts," to the governing bodies of those courts themselves. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941). Such a delegation is permissible precisely because it is limited; some powers "are strictly and exclusively legislative" and thus "must be entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (Marshall, C.J.); *see also Mistretta v. United States*, 488 U.S. 361, 387 (1989) (holding that *Sibbach* merely echoed "what had been our view since *Wayman*"). A delegation confers, at most, the power "to make rules *not inconsistent with the statutes or constitution* of the United States." *Sibbach*, 312 U.S. at 10. And for precisely that reason, the Rules Enabling Act forbids the judiciary from "modify[ing] any substantive right." 28 U.S.C. § 2072(b).

What is at issue here plainly is a substantive right, not a matter of procedure. Applying that same principle in the *Erie* context, this Court has long held that timeliness principles that form an "integral part" of a state law must be applied in federal court, and the Federal Rules "do[] not replace such policy determinations." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980). That principle applies here with even greater force, because the law here is a *federal* one. And the prohibition of tolling is unquestionably an "integral part" of a statute of repose—it

is what distinguishes such a statute from a statute of limitations. *See CTS Corp.*, 134 S. Ct. at 2183. Having written a federal statute of repose to which petitioner's tolling rule would be antithetical, Congress did not turn around and delegate to the courts the power to undo its legislative judgment through rulemaking, if the courts thought it convenient.

For good reason, therefore, Rule 23 makes no mention of any tolling principle that could supersede a statute of repose. The federal judiciary has "no authority to substitute [its] views for those expressed by Congress in a duly enacted statute," whether through rulemaking or federal-common-lawmaking. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978). Yet that substitution is just what petitioner seeks—to swap in the prudential considerations set out in *American Pipe* in place of Congress's contrary decision to preclude tolling by adopting a statute of repose.

III. Long Experience With Abusive Class-Action Practices Refutes Any Argument that "Notice" Can Defeat Repose

Even aside from the impermissibility of applying *American Pipe*'s prudential tolling rule to a statute of repose, the basis for that tolling rule is inapplicable to statutes of repose on its own terms. A statute of repose provides a defendant with certainty. The mere filing of a putative class action does not justify taking away that certainty based on the notion that the class complaint provides notice. And abusive practice under the *American Pipe* rule refutes any claim of notice in any event.

A. The Class Complaint Alone Does Not Provide Defendants with Adequate Notice of the Claims They May Someday Face Under *American Pipe* Tolling

In justifying the tolling of a statute of limitations during the pendency of a putative class action, *American Pipe* emphasized that the class-action complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555. The Court reasoned that the class action thereby provides "the essential information necessary to determine both the subject matter and size of the prospective litigation" within the limitations period. *Id.*; *accord Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims . . . but these ends are met when a class action is commenced.").

Notice is not the point of statutes of repose: they seek instead to assure defendants that any claims not properly asserted within the statutory window are never brought, enabling defendants to plan their affairs with certainty. Thus, even assuming that "generic" notice of a claim could be said to satisfy the objectives of a *limitations* period,[11] it certainly does not satisfy the purposes that underlie statutes of *re-*

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[11] "A mere announcement of an intention to sue puts defendants on notice. No one contends, however, that this simple notice is sufficient to toll the statute." *In re Copper Antitrust Litig.*, 436 F.3d 782, 796 (7th Cir. 2006).

pose. Statutes of repose are not enacted with a view to ensuring that defendants are "notifie[d] . . . of the number and generic identities of the potential plaintiffs who may participate in the judgment" later on. *American Pipe*, 414 U.S. at 555. Rather, they are meant to give defendants a date certain by which their liability for certain acts will come to an end, so that defendants can plan their affairs accordingly.

These purposes simply are not served by a "generic" notification that some indeterminate number of claimants are waiting in the wings, ready to take the stage if the putative class action falters or a class member decides to opt out (which could come many years after the repose period has lapsed)—and perhaps even sooner. *See, e.g.*, *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254 (2d Cir. 2007) (holding that *American Pipe* tolling "applies also to class members who file individual suits before class certification is resolved"); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2007) (same). Not only is the defendant receiving such "notice" left unsure about when his potential exposure will terminate, but the class action in many cases will not even provide an accurate picture of whose claims, and how many, lie over the horizon.

American Pipe tolling, after all, rests on the notion that the defendant is on notice of the claims of everyone in the putative class, up until class certification is denied.[12] *Crown, Cork*, 462 U.S. at 354. But class

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[12] Of course, it may end earlier if, *e.g.*, the case does not survive to the class-certification stage. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011) ("Tolling lasts from the day a class claim is asserted until the

certification is often denied *precisely because* the class definition—the very thing that under *American Pipe* is supposed to provide defendants with "essential information" about their liability exposure—*is inadequate to identify who is within the class and who is not. E.g., Carrera v. Bayer Corp.*, 727 F.3d 300, 312 (3d Cir. 2013) (vacating class certification because members of class were not ascertainable); *Adashunas v. Negley*, 626 F.2d 600, 603-05 (7th Cir. 1980) (same). At most, such class definitions can only hint at defendants' potential exposure. A defendant may know, for example, how many products it sold, and to whom, but may have few means of determining which of their customers (if any) could have suffered the complained-of injury. In such cases, petitioner's rule would leave defendants in great doubt about whether they will be forced to defend old claims (and how many and for how much), even where the legislature, by including a statute of repose, crafted the cause of action to provide certainty and peace on a certain date.

Furthermore, even aside from the inadequacy of the class *definition* recited by the plaintiffs as a source of notice to defendants, the class *claims* may not mark the outer limit of *American Pipe* tolling. Aggressive plaintiff's counsel regularly rely on *American Pipe* to assert claims after a limitations period has run, even though those claims appear *nowhere* in

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day the suit is conclusively not a class action[.]"); *cf. Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 766 (3d Cir. 1983) ("[T]olling of the statute of limitations continue[s] until a final adverse determination of class claims."), *vacated on other grounds*, 468 U.S. 1201 (1984).

the original complaint. Significant new issues, theories, and potential liabilities can thereby be smuggled into a case despite the time bar.

The differences can be dramatic. For instance, the court below has at least twice allowed new claims seeking *treble* damages to be added after the limitations period has run, even though the original class-action complaint did not contain any claim that permitted recovery of treble damages. *See, e.g., Benfield v. Mocatta Metals Corp.*, 26 F.3d 19, 23 (2d Cir. 1994) (allowing a plaintiff to add an otherwise-untimely RICO claim based on *American Pipe* tolling, even though the original class-action complaint contained no RICO claims and "RICO requires more in the way of evidence" than the claims pleaded in that original complaint); *Cullen v. Margiotta*, 811 F.2d 698, 720-21 (2d Cir.) (similar), *overruled on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). The court of appeals held that adding new claims that changed the "degree of exposure to liability (single damages vs. treble damages plus attorneys' fees)" was not a significant difference. *Cullen*, 811 F.2d at 721. That reasoning is untenable in the context of a statute of repose: understanding the exposure to liability on the repose date is *precisely* what a statute of repose is supposed to accomplish.[13]

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[13] Other courts of appeals have applied *American Pipe* tolling more narrowly, limiting it to causes of action that are identical to those alleged in the putative class-action complaint. *E.g., Williams v. Boeing Co.*, 517 F.3d 1120, 1136 (9th Cir. 2008). That reasoning is more consistent with Justice Powell's admonition that *American Pipe* tolling should not "leave[ ] a plaintiff free to raise different or peripheral claims following denial of

B. Abusive Applications of *American Pipe* Tolling Can Compound the Potential Unfairness to Class-Action Defendants

The concerns discussed above are only further compounded by longstanding disagreement over the scope of *American Pipe*'s tolling rule, which has led to a number of abusive applications of the rule. That was not unforeseen: concurring in *American Pipe* itself, Justice Blackmun warned that the Court's decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights," and encouraged district judges to "prevent th[at] type of abuse." 414 U.S. at 561-62. Justice Powell echoed those warnings in *Crown, Cork*, adding that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354. Unfortunately, some class-action attorneys have come to regard *American Pipe*'s tolling rule as precisely the sort of "encouragement" that these Justices sought to forestall.

1. *Placeholder Plaintiffs*: Class-action lawyers have too often made use of "placeholder" suits: suits by plaintiffs who are named in the complaint to represent a putative class, but who in fact have no

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class status." *Crown, Cork*, 462 U.S. at 354. The lack of consensus as to the scope of *American Pipe*'s tolling rule is itself an important source of uncertainty for defendants as to the temporal duration of their liabilities—uncertainty that is anathema to statutes of repose and the reasons for them.

standing or are otherwise unsuited to assert the class members' claims. These "placeholders" serve primarily to buy time until a more suitable class representative can be substituted. That is why some placeholder complaints are filed literally on "the last day of the statute of limitations period." *Hill v. State St. Corp.*, No. 09-cv-12146-NG, 2011 WL 3420439, at *25 (D. Mass. Aug. 3, 2011).

The federal courts have failed to reach consensus as to the permissibility of such tactics, creating uncertainty that itself undermines the purpose of statutes of repose. To their credit, many federal courts have rightly rejected these efforts as abuses of *American Pipe*'s already "generous" tolling rule, and refused to allow tolling. *See, e.g.*, *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990) ("There appears to be no good reason to encourage bringing of a suit merely to extend the period in which to find a class representative."); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987) (recognizing that to permit tolling where named plaintiffs lack standing "may condone or encourage attempts to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene with the benefit of the tolling rule").[14] Other federal courts appear to adopt a categorical ban on tolling where the named plaintiff lacked standing, which serves the same function of curbing abuse.

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[14] *Accord N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653 (PAC), 2010 WL 6508190, at *2 n.1 (S.D.N.Y. Dec. 15, 2010); *Kruse v. Wells Fargo Home Mortg., Inc.*, No. 02-CV-3089 (ILG), 2006 WL 1212512, at *5-6 (E.D.N.Y. May 3, 2006).

See, e.g., Boilermakers Nat'l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1, 748 F. Supp. 2d 1246, 1258-59 (W.D. Wash. 2010); *Palmer v. Stassinos*, 236 F.R.D. 460, 465-66 & n.6 (N.D. Cal. 2006).

Even so, not every federal court has heeded Justice Blackmun's and Justice Powell's admonitions. Indeed, in allowing tolling where the named plaintiffs lacked standing, one court has gone so far as to say that there is nothing "singular or peculiar with respect to 'standing' that would generally prevent the application of the [efficiency-based] consideration expressed in *American Pipe*." *Rose v. Ark. Valley Envtl. & Util. Auth.*, 562 F. Supp. 1180, 1193 (W.D. Mo. 1983).[15] Others have taken a similar view, out of vague, largely anecdotal concerns that any doubts about the named plaintiff's standing might threaten the efficacy of *American Pipe* tolling, by leading class members to flood the docket with protective filings.[16]

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[15] In a similar vein, two courts of appeals have allowed *American Pipe* tolling where the named plaintiff was later found to lack standing, at least where the class had already been certified and notice sent to the class members. *See Griffin v. Singletary*, 17 F.3d 356, 357, 360-61 (11th Cir. 1994); *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1095-98 (3d Cir. 1975).

[16] *See, e.g., Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1161-64 (D.N.M. 2011); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 456 (S.D.N.Y. 2005), *abrogated on other grounds*, 574 F.3d 29 (2d Cir. 2009). Still others have tried to stake out a middle ground, allowing tolling where class members arguably had some reasonable basis for believing the named plaintiff had standing, or where the named plaintiff's standing "was neither 'straightforward' nor 'well settled,'" but rejecting it where "the purported class representative so clearly lacks standing that allowing [tolling] would condone (and even invite) the filing of

In other words, these courts have allowed efficacy considerations to trump the statute: even though the original class-action complaint was filed by a mere placeholder who did not share any injury (or the relevant injury) with the putative class, these courts nonetheless have deemed it preferable to tolerate such abuses than to have the plaintiffs with standing file their own timely complaints.

The upshot of these discordant approaches is that class-action lawyers, often enough, can get away with relying on placeholder plaintiffs and broad class definitions, effectively allowing them to extend the otherwise-applicable time limits for as long as the placeholder class definition remains pending. That may well end up being long after the statute of repose would otherwise have run, allowing absent class members extra time to bring claims that the statute was supposed to have cut short.

2. *"Stacked" Class Actions*: The problem is further exacerbated by the phenomenon of "stacked" class actions: when a putative class action is dismissed or denied certification, members of that failed class bring not just their own individual cases, but *a new putative class action*. The goal is generally to seek a different result from a different judge. *See, e.g., Basch v. Ground Round, Inc.*, 139 F.3d 6, 11-12 (1st Cir. 1998).

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placeholder lawsuits." *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 894 F. Supp. 2d 144, 156 (D. Mass. 2012); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 670 (S.D.N.Y. 2011).

Here, too, the federal courts are divided. The Third Circuit allows tolling so long as the prior class action "was not rejected because of any defects in the class itself but because of [the named plaintiff's] deficiencies as a class representative." *Yang v. Odom*, 392 F.3d 97, 108 (3d Cir. 2004) (citation omitted). More recently, the Sixth Circuit allowed tolling for a successive class action simply because the district court never reached the class-certification issue. *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 479 (6th Cir. 2013). Other courts hold to the contrary that "potential individual plaintiffs cannot extend th[e] limitations period by relying on successive class actions which allege the same class and the same claims." *Basch*, 139 F.3d at 12; *accord Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

Both practices—placeholder plaintiffs and stacked class actions—stem from a longstanding lack of clarity in the federal courts concerning the scope of *American Pipe*'s tolling rule, and raise the very real possibility of unlimited tolling. Too often, courts applying *American Pipe* have approved tactics that would allow a succession of suits, even wholly inadequate placeholder suits, to toll the time limit "perpetually." *Basch*, 139 F.3d at 11. Combined, the lack of doctrinal clarity and the abusive applications of *American Pipe* that arise from it critically undermine certainty for defendants. But where, as here, that certainty is guaranteed by a statute of repose, this Court can prevent any such abuses simply by applying the outer limit that Congress wrote, and holding that the

American Pipe doctrine—however construed—cannot override the statute of repose.

IV. Declining to Extend the Tolling Doctrine to Statutes of Repose Will Not Overwhelm Court Dockets or Prevent Adjudication of Legitimate Claims

Much of petitioner's argument rests on the result-driven notion that *American Pipe* tolling *must* apply to repose periods. Petitioner claims that the supposed need to file protective parallel complaints would create a "logistical and risk management nightmare for courts and defendants," apparently because Section 13's three-year repose period is too short—and securities class-action litigation takes too long—for putative class members to wait until the fate of the class action is decided before deciding whether to opt out. Pet. Br. 22-25; *see also* Institutional Investors' Br. 15-24; Washington Br. 13; Directors' Br. 11-15; Profs.' Br. 5-15; Judges' Br. 7-14.

To be sure, the tolling rule this Court adopted in *American Pipe* was animated by a concern that denying tolling there "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. Even so, the Court recognized that its authority to grant tolling extended no further than what was "consonant with the legislative scheme." *Id.* at 558. Here, as explained, tolling is simply incompatible with a "legislative scheme" that includes a statute of repose. And even if this Court were free to craft petitioner's contrary rule—irrespective of the text of the statute of repose, the contents of Rule 23, and the

constraints of the Rules Enabling Act—petitioner's submission rests on a flawed analysis.

A. *IndyMac* Has Not Led to an Unworkable Surge of Protective Filings

The most obvious flaw with the petitioner's assertion that the *IndyMac* rule will produce an unworkable surge of protective filings is also the most straightforward: In the years since this Court dismissed the *IndyMac* petition as improvidently granted, petitioner's inefficiency theory has been tested and found wanting.

It has now been more than three years since the Second Circuit held in *IndyMac* that *American Pipe* tolling does not apply to 15 U.S.C. § 77m's statute of repose, and the Sixth and Eleventh Circuits have since adopted that same holding. *IndyMac*, 721 F.3d 95; *Stein*, 821 F.3d 780; *Dusek*, 832 F.3d 1243. Yet there is no evidence whatsoever that these decisions have produced the unmanageable flurry of protective filings and duplicative litigation that petitioner says is the inevitable result of that rule. Indeed, there is no evidence that the decisions have caused any problems whatsoever. Two of petitioner's *amici* point to a *single* case in which some number of protective filings were made—the *Petrobras Securities Litigation* case—and there is no indication that those filings caused any concrete problem even there. *See* Institutional Investors Br. at 15-16; Washington Br. at 13. Nor is it even clear that these filings were the result of the *IndyMac* rule, as plaintiffs may choose to opt-out for any number of other reasons.

Thus, despite the fact that the *IndyMac* rule has been tried and has succeeded, academic *amici* submit here the same analysis of federal-court securities class actions filed between 2002-2009 that they submitted in *IndyMac*. Profs.' Br. 5-16.

In an effort to justify their reuse of this stale and empirically contradicted analysis, the professors argue that *IndyMac* was limited to a particular cause of action, and that this, together with a circuit split, has meant that litigants "would have been uncertain as to whether they would enjoy *American Pipe*'s protection if class certification were denied." *Id.* at 17. They also argue that there is limited post-*IndyMac* data. *Id.* at 18-20. But each of those arguments fails to overcome the clear, contrary experience in the Second Circuit in the years since *IndyMac*.

As for litigants' supposed "uncertain[ty] as to whether they would enjoy *American Pipe*'s protection," *id.* at 17, that would be expected to produce *more* protective filings, not fewer. Litigants so concerned about protecting their rights that they would make protective filings in case class certification were denied would surely also make protective filings in case this Court upholds the *IndyMac* rule. Yet there is no evidence that they have done so in any meaningful numbers.

As for the supposed lack of data, the professors concede that there are dozens of pending class actions in which the effects of *IndyMac* can be observed as to at least some portion of the class. *Id.* at 18-19. Yet the professors offer no evidence that the rule has produced any surge in protective filings, much less an unworkable one. To the contrary, as respondents

have explained, there has been no surge in filings at all. Resps.' Cert. Opp. 19-22.

B. The Professors' 2002 to 2009 Study Fails to Address the Relevant Question—The Time From Filing to Class Certification Decision

Moreover, even setting aside the contrary real-world evidence, the professors' analysis of the 2002 to 2009 data does not provide a complete picture of why the claims that are the focus of their analysis are at risk of being time-barred without tolling of the repose period. The professors' figures show only (1) the date when the class action complaint was filed, and (2) how long it took to reach a dismissal or certification ruling from the date when the repose period first started running. Profs.' Br. 7. What that presentation leaves obscured, however, is how long it actually took the *federal court* to rule on dismissal or class certification *after the class-action complaint was filed*. In other words, the professors' analysis does not differentiate between class members whose time ran out because the district judge took too long, and those whose time ran out only because the named plaintiff—and indeed, the absent class member himself—simply waited too long to file in the first place.

At least one study suggests that, in most cases, federal courts are not taking too long to dispose of securities class actions. That study, comprising all federal-court securities class actions filed between 2000 and 2016, found that: (1) the vast majority, 72 percent, were dismissed or settled before any motion for class certification was filed; (2) of the minority of

cases in which a class certification motion was filed, only 55 percent reached a decision on that motion; (3) "[a]pproximately 64% of the decisions on motions for class certification that were reached were within three years from the original filing date of the complaint"; and (4) "[t]he median time was about 2.5 years." STEFAN BOETTRICH & SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2016 FULL-YEAR REVIEW 21-23 (Jan. 2017), goo.gl/o7S0zT.[17]

In sum, there is no evidence that the *IndyMac* rule has in fact proved problematic in the years since the Second Circuit adopted it in *IndyMac*. And federal courts in the vast majority of recent securities class actions disposed of motions to dismiss or for class certification with time to spare on the statute-of-repose clock. In the Securities Act context, that time, even if only a little less than a year in most cases, should be adequate for class members deciding whether to opt out, considering that (1) the statute already expects fast action from plaintiffs, who are in any event required to bring claims under Section 11 or 12(a)(2) of the Securities Act "within one year after the discovery of the untrue statement or the omission," 15 U.S.C. § 77m; (2) plaintiffs need not start from scratch, but can conduct their own investigation with the benefit of the work the named plaintiffs counsel has already done; and (3) plaintiffs, in many jurisdictions, need not wait for class

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[17] The same study reports that the median "time to resolution," *i.e.*, "the time between filing of the first complaint and resolution (whether settlement or dismissal)," for federal-court securities class actions has "declined by more than 10%" during the past decade, and is now 2.4 years. *Id.* at 27.

certification to be denied before filing in order to reap the benefit of *American Pipe* tolling of the applicable limitations period, and thus have plenty of time in which to file no matter how long a certification decision takes. *See Hanford Nuclear*, 534 F.3d at 1009; *WorldCom*, 496 F.3d at 255.

C. Allowing Tolling Would Undermine Other, Longer Repose Periods, Not Just the Securities Act Period

Moreover, even assuming that the Securities Act's repose period creates special problems—and there is no clear evidence that it does—it is not at all apparent that similar difficulties exist under other statutes of repose in the mine-run of federal-court class-action litigation. As noted, many statutes of repose at both the federal and state level, *see* Part I.A, are significantly longer than the one at issue here. For blue sky, professional malpractice, and consumer protection claims (as well as breach-of-fiduciary-duty claims under ERISA), five- or six-year periods are typical.[18] With construction-defect and product-liability claims, ten-year periods also are common.[19]

Studies confirm that these periods are long enough to afford putative class members considering whether to opt out a meaningful opportunity to do so. For example, a 2012 study examined federal-court, federal-question class actions filed or removed between 2003 and 2007. *See* Thomas E. Willging & Emery G.

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[18] *E.g.*, 15 U.S.C. § 1681p(2); 29 U.S.C. § 1113; CAL. CORP. CODE § 25506(b); MICH. COMP. LAWS § 600.5838b(1)(b).

[19] *E.g.*, NEB. REV. STAT. § 25-223; OR. REV. STAT. § 30.905(2)(a); *but see* MASS. GEN. LAWS ch. 260, § 2B.

Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. CIN. L. REV. 315, 316-26 (2012). The authors found that for cases originally filed in federal court (excluding Fair Labor Standards Act collective actions), those that did not end in settlement ended in a median of "about 9.3 months." *Id.* at 328, 344. Those that were settled "took a median time of . . . about 20.9 months." *Id.* The picture was much the same for federal-question class actions removed to federal court: those that were not remanded (typically, within 3.7 months) terminated within "about 9.9 months" in cases that were not settled, about 24.6 months in cases that were. *Id.*

These findings are largely consistent with those of a 2008 study, by the same authors, of 231 federal-court diversity class actions filed between 2003 and 2005. *See* EMERY G. LEE III & THOMAS E. WILLGING, IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 1, 17-18 (2008), goo.gl/HXzf0B. That study found that of those cases that were not remanded, after a median of about 3.5 months: (1) the median time for voluntary dismissals was 9 months; (2) the median time to disposition by "motion, sua sponte order, or summary judgment" was 14 months; and (3) the median time to class settlement was 18.4 months. *Id.* at 7.

Against a statute of repose that allows ten, five, or even three years to sue, the one or two years necessary to dispose of many class actions leaves ample time to make an informed choice whether to opt out. *Cf. Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134

S. Ct. 604, 612 n.4 (2013) (concluding that plaintiff who must spend "15 to 16 months" exhausting administrative remedies out of a three-year contractual limitations period "still [has] ample time for filing suit"). To the extent that time still proves insufficient, in all likelihood that will most often be a function of delay in filing suit in the first place, not of delay in case management.

D. Repose Periods Are a Legislative Judgment So Any Changes Should Be Left to Congress

In any event, even assuming for the sake of discussion (and contrary to all evidence) that a three-year statute of repose is too short to accommodate the realities of federal-court securities-class-action practice in the absence of *American Pipe* tolling, that is a legislative question, not a judicial one. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). Congress is perfectly free to lengthen the repose period if it wishes; indeed, Congress has acted to lengthen statutes of repose at least twice in recent memory, including in the securities context. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801 (inserting what is now 28 U.S.C. § 1658(b)(2), providing five-year statute of repose for securities fraud claims);[20] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1085(7), 124 Stat. 1376, 2085 (2010) (lengthening ECOA's statute of repose to five years).

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[20] The statute of repose for such claims previously was three years. *See Lampf*, 501 U.S. at 364 n.9 (citing 15 U.S.C. § 78i(e)).

The Securities Act, of course, has a three-year statute of repose precisely because Congress previously adopted a much longer repose period, thought better of it, and amended the statute to shorten it. Congress selected three years as the "reasonable time" after which a corporate officer need no longer fear liability. 78 Cong. Rec. 8198 (May 7, 1934) (statement of Sen. Fletcher). And in the years since *Indymac Bank*, Congress has not chosen to lengthen the repose period or to provide for tolling by statute. Arguments that Congress chose too short a time to suit the interests of class-action plaintiffs should be addressed to that body, not to this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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